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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1957.

No. 909.

ANTHONY GIARDANO and ANTHONY LOPIPARO,
Petitioners,

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

REPLY BRIEF FOR PETITIONERS.

MORRIS A. SHENKER,
408 Olive Street,
St. Louis 2, Missouri,
MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Attorneys for Petitioner Giardano.
SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioner Lopiparo.

INDEX.

Page

Argument 1

Conclusion 4

Citations.

Cramer v. United States, 325 U. S. 1 3

Mills v. United States, 228 F. (2d) 645 2
Morris v. United States, 156 F. (2d) 525 2

People v. Cage, 48 Cal. 323 3
People v. Hunckler, 48 Cal. 331 3
People v. Webb, 38 Cal. 467 3

Screws v. United States, 325 U. S. 91 2
Stromberg v. United States, 283 U. S. 359 3

Terminiello v. Chicago, 337 U. S. 1 3

United States v. Levy, 153 F. (2d) 995 2

Wiborg v. United States, 163 U. S. 632 2

Yates v. United States, 354 U. S. 298 3

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ARGUMENT.

1. The Government is in error in contending that the arguments relative to the instructions with one exception were not raised in the Court of Appeals. A Supplemental Brief, filed by leave of the Court of Appeals, set forth both the argument that the jury was not specifically instructed that unanimity is essential as to any particular overt act

found and the argument that the verdict should be set aside because the jury was not required to find specially the overt act on which the verdict rested. The contention that the charge was so framed that petitioners could have been convicted of an offense not charged in the indictment was presented in the Court of Appeals in the Opening Separate Brief on appeal for Anthony Giardano (pp. 10-13). All points relative to the instructions were, therefore, presented to the Court of Appeals.

Petitioners excepted to the instructions in the trial court which allowed the jury to convict if they found that only one of the overt act alleged was committed (R. 171-172). The other errors urged are within the ruling of **Screws v. United States**, 325 U. S. 91, 107, which holds that the trial judge is under a duty to instruct on the fundamental rules of law. After all the trial judge is no mere automation sitting on the bench with no duties to perform. See also **Wiborg v. United States**, 163 U. S. 632, 658; **Mills v. United States**, D. C. Cir., 228 F. (2d) 645, 646; **Morris v. United States**, 9 Cir., 156 F. (2d) 525, 527; **United States v. Levy**, 3 Cir., 153 F. (2d) 995, 998.

Even the Court of Appeals acknowledged that the jury was not fully instructed when it concluded that since Section 145 (b) "was read to the jury during the opening statement of the prosecutor" (Pet. 33), there was a sufficient statement of the law when it retired to deliberate. The court below found that it "appeared to be superfluous to read the words of section 145 (b)" (Pet. 33).

The Government's statement that the jury was told that their verdict must be unanimous overlooks the fact that the jury was not expressly instructed that their verdict must be unanimous for each overt act or acts found. This is apparently the first time this issue has been squarely raised before this Court other than in a treason case or a case involving constitutional issues. In those cases, the

Court has held that there must be unanimity on each of the overt acts. See **Cramer v. United States**, 325 U. S. 1, 35, footnote 45, **Stromberg v. California**, 283 U. S. 359, 368; **Terminiello v. Chicago**, 337 U. S. 1, 5.

2. The Government says that the jury was not allowed to convict petitioners by finding a legally insufficient overt act. It contends that the finding of the overt act of the mere filing of a corporate return (not a false return) is sufficient because "the allegation of the overt act—that the return was filed—makes plain that the means alleged were employed". Brief for the United States in Opposition, p. 14. The deficiency in that argument is that it eliminates the requirement of an overt act. Conspirators may make an illicit agreement and yet not commit an overt act in furtherance of their plan. Moreover, the court below, over objection, charged the jury that it was not incumbent upon the prosecution to prove that all of the means set out in the indictment were in fact agreed upon to carry out the conspiracy (R. 163).

3. The issue as to double jeopardy and res judicata was raised in oral argument in the court below and in the petition for rehearing. Appellants' Petition for Rehearing, pp. 2-3. A dismissal of a charge after it has been tried has been held to be tantamount to an acquittal. Cf. **People v. Cage**, 48 Cal. 323; **People v. Webb**, 38 Cal. 467; **People v. Hunckler**, 48 Cal. 331. With respect to collateral estoppel by judgment, that problem was considered by this Court recently in **Yates v. United States**, 354 U. S. 298, 335-338.

4. There was no credible evidence to support "the charge of compulsion by the medium of fear." The evidence only showed that the customers of the tax stamping service lost some vending machine locations by ordinary business competition (R. 69, 105-106, 103, 86). And most of their losses

were to other dealers not connected with the Twin City Corporation. The loss of business by ordinary business competition not of such a nature as to amount to unfair competition is not sufficient to show "compulsion by the medium of fear." Such an allegation is unnecessary and prejudicial to a charge of conspiracy to attempt to evade taxes.

This Court should exercise its supervisory jurisdiction over criminal justice by granting a hearing and determining the issues presented by this case.

CONCLUSION.

For the reasons set out above and those set out in the petition, the writ of certiorari should be granted.

Respectfully submitted,

MORRIS A. SHENKER,
408 Olive Street,
St. Louis 2, Missouri,

MORRIS LAVINE,
215 West Seventh Street,
Los Angeles 14, California,
Attorneys for Petitioner Giardano.

SIDNEY M. GLAZER,
408 Olive Street,
St. Louis 2, Missouri,
Attorney for Petitioner Lopiparo.